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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945. No. 365.

SEAS SHIPPING COMPANY, INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS BELOW.

The opinion of the District Court is reported at 57 Federal Supplement 724, and that of the Circuit Court of Appeals at 149 F. (2d) 98.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition is provided by Section 347a of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Does a shipowner who is not negligent nevertheless warrant to a stevedore employed by an independent contractor that the appliances of his vessel are completely free from defects?

2. Is a stevedore a seaman in the sense that he is entitled to the same warranty of seaworthiness of the vessel as a member of the crew?

3. Is the warranty of seaworthiness founded upon tort or contract?

4. May the Admiralty doctrine allowing recovery of damages by a seaman as a result of the failure to furnish a seaworthy vessel be applied upon the law side of the District Court in favor of a stevedore?

5. Is the liability, if any, of Petitioner, the shipowner, primary or only secondary?

STATEMENT OF THE CASE.

Joseph Sieracki, the Respondent herein, was employed as a longshoreman or stevedore by B. H. Sobelman & Co., a firm of independent contracting stevedores. Sobelman had a contract to load the Petitioner's vessel "Robin Sherwood" at Philadelphia.

On December 23, 1942 his employer, Sobelman, assigned Sieracki to operate one of the winches which controlled the 10-ton heavy lift, or "jumbo," boom of the ship.

The Petitioner's vessel, "Robin Sherwood", had been built under a contract between the United States Maritime Commission and Bethlehem Steel Company, by the latter company and a sub-contractor, Bethlehem Sparrows Point Shipyard, Inc. When the vessel was completed, and before delivery to the Petitioner, the usual tests required by the Maritime Commission were made and certificates entitled "Certificates of Test of Cargo Handling Gear" (R. 104b-104c) were issued over the signatures of representatives of the shipbuilder and the Maritime Commission and delivered with the vessel. The man who was to become Master of the vessel, Captain Bonn, attended as an observer (R. 58). The vessel was then put in service, but because of the fact that there were two 5-ton booms in addition to the 10-ton heavy lift boom at the same hatch, (R. 59) it had not been necessary to use the heavy lift boom between the date of the tests and the date of the accident here in question. During the intervening months the District Court found, and the Circuit Court of Appeals affirmed the finding, that the gear had been properly cared for.

On December 23, 1942, the stevedores had loaded one piece of cargo weighing approximately 8.2 tons, and were loading a second piece of the same weight when the accident occurred which gave rise to this cause of action. The heavy steel shackle of the topping lift at the peak of the 58-foot "jumbo" boom broke, and the boom fell, injuring the Respondent. He commenced a civil action in the United States District Court for the Eastern District of Pennsylvania against the Petitioner. The Petitioner impleaded Bethelehem Steel Company and Bethlehem Sparrows Point Shipyard, Inc., and filed an Answer denying liability to the Respondent, but averring that if liability on the part of the Petitioner were shown, it had a right of action over against the two impleaded Defendants. The Respondent herein then filed an Amended Complaint against the impleaded Defendants, and the case proceeded to trial before United States District Judge Kirkpatrick and a jury. At the close of the evidence the amount of the damages was stipulated; the case was withdrawn from the jury, and it was agreed that the Court should determine the questions of liability.

The evidence at the trial clearly supports the finding by the District Judge, affirmed by the Circuit Court of Appeals, that the accident was caused by a defect inside the metal of the shackle. The defect was a flaw in the metal commonly known as a "pipe". This defect was a shrinkage cavity which originated at the time the steel first solidified. (R. 65, 66) The shackle was then forged, galvanized and painted prior to the time the completed ship was delivered to the Petitioner (R. 58). Its existence was not ascertainable by any external inspection, although the District Judge found as a fact that its presence probably would have been disclosed by X-ray, or by a destructive metallurgical test known as a deep-etch or macro-etch (R. 103, 104, 127).

The District Court found that the additional Defendants, the Bethlehem Companies, had been negligent and entered judgment against them. This was affirmed by the Circuit Court of Appeals. The District Court found that

the Petitioner was not negligent, and this finding was affirmed by the Circuit Court. The District Court held that the Plaintiff-Respondent, a stevedore, was not entitled to a verdict against Petitioner on the mere showing of the defect which constituted unseaworthiness, and was not a "seaman", and could not recover against Petitioner under the general Maritime Law upon a finding of unseaworthiness alone without negligence. The Circuit Court of Appeals reversed this holding of the District Court and held that since the stevedoring work which the Plaintiff was doing at the time of his injury had, in remote times, been done by the members of the ship's crew, he was a "seaman" and entitled to recover on a showing that his injury was caused by unseaworthiness alone, without negligence. A joint judgment against the Bethlehem Companies on the one hand and the Petitioner on the other was thus entered.

ARGUMENT.

The decision of the Circuit Court of Appeals holds that a longshoreman or stevedore is entitled to recover damages from a shipowner by reason of injuries received on board a ship which were caused, not by the negligence of the shipowner, but by the negligence of a third party, the shipbuilder.

The first two points discussed herein become applicable if, and only if, the main point in the case should be decided against the Petitioner. It is not conceded, however, that there should be any right of recovery by this Respondent against this Petitioner.

The doctrine of seaworthiness is an admiralty doctrine and has no application in an action on the civil side of the court.

There is no question but that the Respondent's cause of action is of a maritime nature, and thus within the Admiralty jurisdiction. *Atlantic Transportation Co. v. Imbrovek*, 234 U. S. 52; 34 S. Ct. 731. The doctrine of seaworthiness is an Admiralty doctrine and was heretofore cognizable only in Admiralty, *Panama R. Co. v. Johnson*, 264 U. S. 375; 44 S. Ct. 391; *The Osceola*, 189 U. S. 158; 23 S. Ct. 483. When Mr. Justice Brown, in *The Osceola, supra*, said, "upon a full review, however, of English and American authorities upon these questions . . .", we think it is clear that he referred to a review of Admiralty and not common law authorities. This Court has, impliedly, recognized the Admiralty application of the doctrine. In *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; 64 S. Ct. 455, this Court said:

> "*But the admiralty rule* that the vessel is liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and

equipment, has been settled law since this Court's ruling to that effect in The Osceola." (Italics ours.)

If seaworthiness is an Admiralty doctrine, within the language of Section 41 of Title 28 of the United States Code, jurisdiction is in Admiralty and the remedy is not "saved" because it is not a common law remedy.

"It is not a remedy in the common law courts which is saved, but a common law remedy." *The Moses Taylor*, 71 U. S. 411; 18 L. Ed. 397.

Since the present action was instituted upon the *law side* of the District Court, it is the position of the Petitioner that it was improper to rest the decision upon an Admiralty doctrine and that any recovery by the Respondent should have been predicated only upon the common law ground of negligence. The following comment expresses the Petitioner's position on this point:

"It surely needs no argument to show that if several different system of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to administer it, or there will be no certainty in the law, . . . It will not do for a common law court to proceed in accordance with the Admiralty law, nor for an Admiralty Court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the Admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate." Frederic Cunningham in *18 Harvard Law Review 294.*

The rationale of the decision in *Schuede v. Zenith S. S. Co.*, 216 Fed. 566,[1] affirmed 244 U. S. 646, 37 S. Ct. 652, supports our views. In *American Steamboat Co. v. Chace, Adm'r.*, 83 U. S. 369 at 372, the Court said:

"Examined carefully, it is evident that Congress intended by that provision to allow the party to seek re-

[1] Cited in Report of Senate Committee, post, p. 23.

dress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and *may resort to his common law remedy* in the State Courts, or in the Circuit Courts of the United States if he can make proper parties to give the circuit court jurisdiction of his case." (Italics ours.)

In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, in the dissenting opinion of Mr. Justice Pitney, the following language seems to us to be applicable to this phase of this case:

". . . . if, . . . , it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a Federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari) from this court to the state court of last resort. Yet, until the present case, and others submitted at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the bar and of the judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts."

In the dissent of Mr. Justice Holmes in the same case, at page 531 of 37 S. Ct., it is said:

> "This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court."

The so-called doctrine of seaworthiness is as strictly an Admiralty doctrine as specific performance is an equitable doctrine. Few would argue that an action at common law could be maintained for specific performance.

The decision in *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239; 63 S. Ct. 246 is not opposed to this view. There the Court was applying an Act of Congress (The Jones Act) which modified the Maritime Law. Here there is no statute involved although we do not dispute for a moment the power of Congress to legislate on the subject if it so chooses. The fact is that it has not chosen, and its views on the subject are reflected in Congressional reports hereinafter cited. Congress apparently accepted without question the reasoning of *Schuede v. Zenith S. S. Co., supra*, when that case was cited in the report of the Senate Committee, ante, p. 23.

If the decision of the Circuit Court is correct, a stevedore can obtain a jury trial in the District Court and recover upon the basis of unseaworthiness without a showing of negligence, whereas a member of the crew, to obtain a jury trial in the same Court, must prove negligence under the *Jones Act*, 46 U. S. C. A. 688, or proceed in Admiralty, if his cause of action is based on unseaworthiness. *Mahnich v. Southern, S. S. Co., supra.*

Since there was a judgment against a negligent tort-feasor and a party who was not negligent, the liability, if any, of the petitioner, the non-negligent party, is secondary and the petitioner should not be held jointly liable with the negligent tort-feasor.

Both the District Court and the Circuit Court of Appeals found negligence on the part of the Bethlehem Companies, the Third-Party Defendants, and held them liable on that ground. Your Petitioner was exonerated of any negligence by the Judge of the District Court, and this was affirmed by the Circuit Court of Appeals. The basis upon which the Circuit Court held the Petitioner liable was a breach of an implied warranty of seaworthiness. There are many decisions in the maritime law, as in other fields, recognizing the doctrine of primary and secondary liability. *Crane Co. v. Evans Transp. Co. et al.* 1945 A. M. C. 1079; *The Jungshoved*, 290 Fed. 733; cert. den. 263 U. S. 707; 44 S. Ct. 35; *The Tommy*, 39 F. (2d) 577.

It is submitted that the principle enunciated by these cases is sound. The Admiralty doctrine is that the negligent tort-feasor is primarily liable and the party held liable solely by reason of a breach of the warranty of seaworthiness is only secondarily liable. The judgment as it now stands treats the Petitioner and the Bethlehem Companies as if they were joint tort-feasors and, upon the basis of the present judgment, each would eventually be liable for one-half of the amount of the judgment.

Even should this Court affirm the holding of the Circuit Court of Appeals upon the main point in issue, it is submitted that the liability of the Petitioner is, properly, only secondary to that of the Bethlehem Companies and the judgment of the Circuit Court, if not reversed, should be modified accordingly.

The respondent is not a seaman and should not be entitled to the same right of recovery as a seaman.

The important point for decision by this Court is whether or not the Respondent, a stevedore, is a "seaman," as that term is used in the general Maritime Law, and as such, entitled to a recovery against a shipowner upon the same ground as a member of the crew of the vessel.

As far as counsel for Petitioner has been able to discover, there is no other reported case where a stevedore or longshoreman has been granted a recovery against a shipowner on the ground that the latter was responsible to him for a non-negligent but unseaworthy condition. An examination of the reasons underlying the rule as it is applied to seamen who are members of the crew shows that the reasons are not applicable to a stevedore or longshoreman. The fact that apparently no prior decision has granted such a right is a cogent argument that no such right exists, especially in a field which has been so thoroughly litigated.

In the *City of Alexandria,* 17 Fed. 390 at 395, Judge Addison Brown, although discussing another subject, put this point very precisely.

> "Beyond this I find no authority in the ancient or modern codes, in the recognized textbooks, or the decisions on maritime law, for the allowance of consequential damages . . . Considering the frequency of such accidents, and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable, beyond what has been stated, is evidence of the strongest character that no further liability under the maritime law exists."

At page 396 of the same opinion Judge Brown states:

> "When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for

the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established. In this case there is no charge of any remissness on the part of the owners, and the injury arose from causes in no way under their control. There is no ground in reason, therefore, for holding them or the vessel liable; and the maritime law affords no sanction for any claim to compensation beyond that already received . . . "

The reasons underlying the rule of liability for unseaworthiness are referred to by this Court in at least two other decisions. Speaking for the Court in *Mahnich v. Southern S. S. Co., supra*, Mr. Chief Justice Stone said:

> "The latter rule (liability to indemnify a seaman for injury caused by unseaworthiness) seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in The Osceola, supra, by numerous decisions of the lower federal courts during the last century. See The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707.
>
> This was a recognized departure from the rule of the English Law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, Couch v. Steel, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, . . . re-enacted by the Merchant Shipping Act of 1894 . . . By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof, an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage."

In *The Arizona v. Anelich, supra* (opinion by Mr. Justice Stone), the following language appears in a footnote on page 121 of 298 U. S.; 56 S. Ct. 707 at 710:

"The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in Dixon v. The Cyrus, Fed. Cas. No. 3,930, 2 Pet. Adm. 407 (D. C. Pa. 1789), where it was held that the law will imply an engagement to the mariners that 'the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy.' This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. Halverson v. Nisen, Fed. Cas. No. 5,970, 3 Sawy. 562; The Noddleburn (D. C.) 28 F. 855, 856; The Lizzie Frank (D. C. 31 F. 477; and see The Wenonah, Fed. Cas. No. 17,412, 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, art. VIII, Moloy, De Jure Maritimo et Navali (7th Ed. 1722) p. 223. The seaman's right of indemnity was sustained in The City of Alexandria (D. C.) 17 F. 390; The Edith Godden (D. C.) 23 F. 43; Olson v. Flavel (D. C.) 34 F. 477; The A. Heaton (C. C.) 43 F. 592; The Frank and Willie (D. C.) 45 F. 494; The Julia Fowler (D. C.) 49 F. 277. A seaman was denied recovery for injuries in Couch v. Steele (1853) 3 El. & Bl. 402, on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in The Noddleburn, supra, 28 F. 855, 857, which allowed recovery for an injury due to defective rigging. The Merchant Shipping Act of 1876, 39-40 Vict. ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vesssl and the seamen on board an implied obligation 'that the owner

of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same.' (See Hedley v. Pinkney & Sons S. S. Co. (1894) A. C. 222, strictly construing this statute.''

See also *Dixon v. The Cyrus, supra; Parsons on Maritime Law* (1859 Edition).

If the reasons given for the rule of warranty of seaworthiness are correct, and we urge that they are, they are not applicable to longshoremen and stevedores. By the very nature of his employment, the stevedore is a stranger to the shipowner. He works on the ship only while it is in port loading or unloading cargo. He is not bound to the ship by a contract embraced in the Shipping Articles. He has the privilege of abandoning the ship at any time, and not merely if it be improperly fitted out. If he were to leave the ship, no penalty would attach to his action as there would in the case of a seaman in the true sense of the word, who would be guilty of desertion. Desertion is still an offense on American vessels, and entails forfeiture of wages, 46 U. S. C. A. 701 (3rd sub-section). In former times, the seaman who left his vessel without authority was subject to apprehension by shore authorities, and could be lodged in jail until the vessel was ready to sail, when he would be returned to the ship. *Revised Statutes of the United States*, § 4598 (Repealed in 1898). See *Robertson et al. v. Baldwin*, 165 U. S. 275; 17 S. Ct. 326. Not one of the reasons for the rule is applicable to the case of a stevedore who is employed by a local contractor and who today works at unloading a ship and tomorrow may work ashore loading the same cargo into railroad cars. Cf. *Report of the Judiciary Committee of the Senate, No. 94, 67th Congress, First Session; June 6, 1921*, where the following statement appears with reference to stevedores:

"They do not in all cases form a special class always employed in this work."

If, as stated in *The Arizona v. Anelich, supra*, the right to indemnity for injuries due to unseaworthiness stems from the right to abandon a vessel improperly fitted out because "the law will imply an engagement to the *mariners* (italics ours) that the ship shall be furnished with all the necessary and customary requisites for navigation", how can the rule be said to apply to a longshoreman or stevedore?

The warranty of seaworthiness is founded upon a contractual relationship.

The decision of the Circuit Court of Appeals in the instant case loses sight of the fact that the origin of the doctrine of liability to a seaman by reason of furnishing an unseaworthy vessel or appliances was really one incorporated in the contract of employment, and hitherto applied only when the relationship of master and servant existed.

The Circuit Court concedes that, if the warranty depends upon contract, it cannot apply to this case. But, the Court states, the term "warranty" is not intended to indicate a reason for the resulting liability but rather is a term used to describe such liability, in the nature of an insurer's liability which is rooted in the Admiralty law. But it is so rooted only where there is a contract of a special nature between the parties, be it a contract for the carriage of goods, a contract of employment, or a contract for the chartering of a vessel. Maritime torts and maritime contracts are the classical examples of Admiralty jurisdiction. The decision of this Court in *The Osceola, supra*, is the very foundation of the American doctrine, yet that decision can be reconciled with the decisions which preceded and followed it only upon the basis that the warranty had its foundation in contract. Here there is no tort unless there can be read into the general Maritime Law, untouched by statutes such as the Jones Act, an insurer's liability, one where, in

the old common-law sense of the word, there has been no tort because there has been no negligence. In "*Liability in the Admiralty for Injuries to Seamen*" by Fitz-Henry Smith, Jr., in 19 Harvard Law Review 418, the author examines the doctrine and reaches the conclusion that the liability of a shipowner for injuries to seamen can have its broadest application only if liability is predicated upon the existence of a contract relationship between the owner and the seamen and the breach thereof:

> "The ground of liability in the first instance is, in reality, *breach of contract*, although the action may sound in tort, and the principle involved is not unlike that of the common law which refuses to deny recovery to the workman on land, when the employer has failed to perform one of his so-called non-assignable duties."

At page 440 of the same article, the following appears:

> "It might be well for the uniformity of the maritime law if the rights of seamen to general damages for physical injuries were made to depend entirely upon contract. . . ."

That the master and servant, or employer and employee, relationship is a sufficient and distinct ground for changing the relationships which ordinarily exist between persons is so clear as not to require the citation of authority to this Court. The Petitioner is not the employer of the Respondent in this case, and he is not the employer of the numerous classes of workmen who may come on board his ship while it is in port, such as welders, radio repairmen and the like.[2] He requires their services for the repairs and maintenance necessary by reason of the high duty imposed upon him to furnish a vessel seaworthy in all respects for its intended voyage. The same reasons which make the rule desirable as to a member of the crew who must obey all lawful commands and is subject to penalties if he leaves the

[2] Cf. Dissenting opinion of Mr. Justice Brandeis, in *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219; 44 S. Ct. 302, wherein reference is made to an upholsterer.

employment without authority, do not apply to these port workmen who live ashore, work by the hour or the day, do not put out to sea, are not subject to the orders of the officers, and who may walk ashore without hindrance whenever they choose.

The opinion of the Circuit Court points out that if one of the sailors had been hit by the falling boom, he could have recovered on the basis of the breach of the warranty of seaworthiness. We do not here argue the question, but point out that here again the contractual relationship between employer and employee is the basis of the distinction which should be made.

The American law has never applied the warranty of seaworthiness to a stevedore or longshoreman.

The responsibility of a shipowner to a longshoreman or stevedore injured on board the vessel was always, heretofore, grounded upon negligence. The following quotations summarize the law and its application.

> "The ship is not an insurer of its appliances nor of the invitees who may operate the gear. It is bound, however, to furnish suitable tackle and machinery, reasonably safe, and strong for the work at hand. . . . A secret defect in such gear, even though effecting casualty, will not fasten responsibility upon the vessel or her owners." *The Mercier,* 5 F. Supp. 511; affirmed per curiam 72 F. (2d) 1008.

> "As libelant was an employee of an independent contractor, the relationship of master and servant did not exist between him and the steamship company. However, it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with, suitable to the work being done, and of inspecting these appliances before turning them over to the contracting company." *Luckenbach S. S. Co., Inc. et al v. Buzynski,* 19 F. (2d) 871.

"Libelant not being a member of the crew, no question of seaman's rights or contracts arise, under The Osceola, supra. He must recover on principles of negligence." *The Howell,* 273 Fed. 513.

"The necessary condition of the defendant's liability is that he owed to Jeffries a duty of care, in violation whereof he negligently committed or omitted some act, and thereby proximately caused the fatal catastrophe." *Jeffries v. DeHart,* 102 Fed. 765.

". . . . The libelant must go farther and show that the fracture was the result of a defect, and that the claimant knew of that defect or by the exercise of reasonable care could have discovered it." *Jensen v. Bank Line,* 26 F. (2d) 173.

Other cases applying the same rule are *DeLuca v. Shepard S. S. Co., Inc.* 65 F. (2d) 566; modified 67 F. (2d) 437; *Panama Mail Steamship Co. v. Davis,* 79 F. (2d) 430. The principle is recognized in the language and rationale of the Courts in the following decisions:

Freeman v. A. H. Bull S. S. Co., 125 F. (2d) 774 (C. C. A. 5th).

Skolar v. Lehigh Valley R. Co., 60 F. (2d) 893 (C. C. A. 2nd).

Scheffler v. Moran Towing & Transportation Co., Inc. et al, 68 F. (2d) 11 (C. C. A. 2nd).

The Bolton Castle, 250 Fed. 403 (C. C. A. 1st).

The Drummond, 114 Fed. 976 (D. C., Pa.).

Johnston v. Turnbull, 130 Fed. 769 (C. C. A. 3rd).

Steel et al v. McNeil, 60 Fed. 105 (C. C. A. 5th).

Hamburger-Americanische, etc. v. Gye, 207 Fed. 247 (C. C. A. 5th); cert. den. 231 U S. 755; 34 S. Ct. 323.

The Henry S. Grove, 22 F. (2d) 444 at 447 (D. C., Md.).

Cornec v. Baltimore & O. R. Co., 48 F. (2d) 497 (C. C. A. 4th); cert. den. 284 U. S. 621; 52 S. Ct. 9.

The Maharajah, 40 Fed. 784 (Opinion by Judge Addison Brown).

The authorities are clear that the duty owed was one of reasonable care. *48 American Jurisprudence*, page 144, §§213, 214; *44 A. L. R.* 1025; *24 R. C. L.*, page 1220, §§297, 298; *Hughes on Admiralty, Second Edition*, §104; *Robinson on Admiralty*, pages 318, 319. The decision of the Circuit Court in the case at Bar strikes down the rule of reasonable care and substitutes an absolute warranty irrespective of negligence. The Petitioner has never disputed that it owes a duty of care toward longshoremen and stevedores who come aboard its vessel in port to load and discharge the vessel, but it contends that the so-called "warranty of seaworthiness" extends only to seamen who are actually members of the crew, and arises by reason of the master and servant relationship there existing, and the peculiar status of seamen at sea, which considerations are not present as between the Petitioner and the Respondent.

The Circuit Court of Appeals reasons that the service of stevedores and longshoremen is necessary to carry out the business of the ship and that this work was once, long ago, performed by the members of the ship's crew. It is not disputed that the injury is one which comes within the classification of a marine tort, *Atlantic Transportation Co. v. Imbrovek, supra*, but Petitioner disputes the reasoning that, although the work is now done by a distinct class of workmen, these workmen should be governed by the ancient rights of those who formerly performed the same labor. The statement that the work done by stevedores was once performed by members of the crew appears to have first been made in a decision by Judge Benedict, *The Circassian*, 1 Ben. 209. Counsel for Petitioner has little doubt as to its accuracy, but our research into the American law

discloses that the work of loading and unloading cargo in the United States has traditionally been done, in whole or in part, by a group of land workers who have been known by different names from time to time. Some early cases referred to them as "roustabouts". *Cf. Liability for Injury to Roustabouts*, 54 Central Law Journal 264. Other cases call them "freighters"; "landsmen", and "workmen coming on board"; *The Ole Oleson*, 20 Fed. 384; *The Max Morris*, 24 Fed. 860; 137 U. S. 1; *Hughes on Admiralty, supra*, § 103. Regardless of whether or not the work was once done by members of the crew, times change. The reason for the rule ceases when the conditions which gave rise to it originally have been dissipated by time and changing conditions. It is a questionable rule which depends upon the job classification of centuries ago for a present finding of liability.

Stevedores Are Not Seamen under the General Maritime Law.

The real foundation of the opinion of the Circuit Court of Appeals rests upon the holding of this Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19. In that case this Court was interpreting an Act of Congress, §33 of the Merchant Marine Act of 1920, commonly referred to as the *Jones Act*, supra.

In writing the opinion of the Court in that case, Mr. Justice Holmes said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

That decision was handed down on October 18, 1926. Less than six months thereafter, on March 4, 1927, Congress

did the very thing which Mr. Justice Holmes, for the Court, had stated he could not believe Congress would allow. It made mandatory the variation of the protection afforded, depending upon the fortuitous circumstances of the man's employment by a stevedore or by the ship. This it accomplished by enacting the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901 et seq. See *Robinson on Admiralty*, supra; Stanley Morrison, *"Workmen's Compensation and Maritime Law"*, 38 Yale Law Journal 472.

The Court in the *Haverty* case recognized that, under the general Maritime Law, a stevedore was not a seaman and all that the decision stands for is that under a particular statute, the Court believed that Congress intended to include stevedores when it used the term "seamen".

In the *Haverty* case, this Court was dealing with an unusual situation. Stevedores and longshoremen had first received compensation in accordance with the Workmen's Compensation statute of the particular state in which they worked. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205; 37 S. Ct. 524, this Court struck down an award of compensation under the New York Statute, and held that it was beyond the power of the state to so regulate a maritime occupation. Congress then passed an amendment to §24 of the Judicial Code, enacted October 6, 1917, C. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; 40 S. Ct. 438, this Court held that such an enactment was beyond the power of Congress. The Act was again amended by the Act of June 10, 1922, C. 216, 42 Stat. 634. In the *State of Washington v. W. C. Dawson & Co., supra*, the Amendment was held unconstitutional. It will thus be seen that when the case of *International Stevedoring Co. v. Haverty* came before this Court, stevedores and longshoremen were completely without redress for injuries received in the course of their employment except under such circumstances as the Maritime Law provided for an action based upon negligence. In 1920, Congress had passed the Merchant Mari-

Act, which included within it the Jones Act, supra, which gave to seamen the same rights which Congress had previously granted to employees of railroads engaged in interstate commerce. A study of the record in the *Haverty* case shows that the idea that perhaps stevedores could be construed to be seamen within the Congressional intent of the Jones Act, originated in the opinion of the Chief Justice of the Supreme Court of the State of Washington. He merely raised the point as an interesting one, but held himself bound by prior decisions to the contrary. It must be remembered that these prior decisions had been under the general Maritime Law, and uniformly held that there was a distinction between a seaman who signed Shipping Articles and sailed on a voyage, and a longshoreman employed by an independent contractor whose only connection with the vessel was to load or unload it while in port. The Briefs of counsel before this Court in the *Haverty* case show that the possibility of Haverty's being construed to be a seaman under the Jones Act was not seriously considered, and is only referred to briefly and without forceful argument in the Brief of the Respondent. The Petition for Re-hearing in the *Haverty* case indicates that the question first arose seriously during the oral argument before this Court.

The question of whether or not the *Haverty* decision construing a stevedore to be a seaman within the meaning of the Jones Act properly reflected the intention of Congress has been the subject of widespread discussion. The Merchant Marine Act of 1920, of which the Jones Act is a section, expressly referred to both stevedores and seamen. In § 30 of the Act, stevedores are twice mentioned in express terms with reference to liens. It is difficult to believe that such a loose use of words can be attributed to Congress in enacting legislation, and if stevedores had been intended to be included within the Jones Act, Congress would undoubtedly have mentioned them specifically. This view is supported by later reports of the Judiciary Com-

mittees of the House of Representatives and the Senate. The House of Representatives Report, No. 639, Second Session, 67th Congress, dated January 31, 1922, clarly indicates that the Judiciary Committee believed that longshoremen and stevedores were a class apart from the seamen who had been given the benefit of the Jones Act. The Report states, "Economically, port workmen and seamen are distinct". The Report of the Judiciary Committee of the Senate on the same bill is even more enlightening. It is Report No. 94, 67th Congress, First Session, and is dated June 6, 1921. The Report was presented by the late Senator Borah. The Report, in part, reads as follows:

> *"There is a clear distinction between the two classes, seamen and landsmen who work in or about ships,* who were confused in the Johnson Amendment and in the situation which arose in the Jensen case. The distinctions are based upon the facts of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers which, in the case of seamen, are ships and shipowners, and in the case of landsmen, in the main, independent local contractors." (Italics ours.)
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> "The rights of a seaman when injured in the course of his employment are governed not by the common-law of torts but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the U. S. Marine Hospital is open to him without expense on his part until he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly

from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (*Schuede v. Zenith S. S. Co.*, 216 Fed. 566, 570.) *The special treatment which seamen have always had under the Acts of Congress was recently emphasized by the provisions in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.*

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. *The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them.* They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident." (Italics ours.)

These two reports were made in connection with legislation intended to bring stevedores and longshoremen within the protection of the workmen's compensation statutes of the various states. They were made after the passage of the Jones Act, and before the decision of this Court in the *Haverty* case.

The Jones Act was enacted in 1920. In 1924 this Court had before it the case of the *State of Washington v. W. C. Dawson & Co., supra.* One month prior to the hearing of that case, this Court had before it for consideration the Jones Act, supra, in the case of *Panama R. Co. v. Johnson, supra.* If in fact, the Jones Act had supplied a general employers' liability law for stevedores and longshoremen, it is difficult if not impossible to explain the use by this Court in the opinion in the *Dawson* case of the statement that the power of Congress "would permit enactment of a general employers liability law or general provisions for compensating injured employees." If the decision in the *Haverty* case is correct, there was, at the time of the opinion in the *Dawson* case, already an employers' liability law applicable to stevedores and longshoremen, and the decision in the *Dawson* case would necessarily have turned upon the question of how far Congress could permit state laws to apply in a field which Congress had *already* exclusively occupied by a general employers' liability statute.

The *Haverty* decision concerned only the Court's interpretation of the Jones Act, and must be strictly limited, therefore, to actions brought under that Act *by a stevedore against his employer.* The Jones Act governs only liabilities between employee and employer. For all practical purposes, therefore, the effect of the *Haverty* decision was nullified by the passage of the Longshoremen's and Harbor Workers' Compensation Act, which substituted the exclusive remedy of statutory compensation for all other liability whatsoever, as between a stevedore employer and his employee injured on navigable waters. Cf. *Swanson v. Marra Bros., Inc.,* 57 F. Supp. 456; affirmed per curiam 149 F. (2d) 646, certiorari granted November 5, 1945.

In the instant case, the Jones Act is not involved, since the action is not brought by a stevedore against his employer. This is a suit by a stevedore against "third parties", to wit, a shipowner and the builders of the ship, none of whom was his employer. It follows that the *Hav-*

erty decision is not controlling. The decision in the *Haverty* case simply held that, in passing the Jones Act, Congress *intended* that the term seamen as used in that Act should include stevedores. No interpretation of the intent of Congress is involved in the instant case. The Circuit Court, however, has borrowed not the reasoning, but the *result* of the reasoning in the *Haverty* case, and has applied it to upset a long established principle of general Maritime Law. It has held that the warranty of seaworthiness, hitherto available only to a seaman against his ship or employer in an Admiralty action, is now available to a stevedore in a Civil Action against third parties, none of whom was his employer.

There are many clear and well-defined distinctions between a seaman in the ordinary sense of the word, and a stevedore. The Report of the Senate Committee referred to above sets forth some of them. A seaman is essentially a migratory worker, whereas the stevedore is not. A seaman is entitled to the benefits of the United States Marine Hospitals, and a stevedore is not. Stevedores are not certificated by the Department of Commerce as seamen must be. Stevedores receive time and one-half for work in excess of 40 hours per week whereas *seamen* are exempt from this provision of the *Fair Labor Standards Act*, 29 U. S. C. A. 213, and the regulations thereunder. Stevedores have differentiated themselves from seamen in that they are members of different unions for the purposes of collective bargaining.

Congress has always provided differently for seamen, in the true sense of the word, and longshoremen or harbor workers. The *Shipping Commissioner's Act*, 46 U. S. C. A. 541 et seq. provides a series of regulations applicable to the hiring, treatment, payment, and well being of merchant seamen. Congress has provided Marine Hospitals for the care of seamen, required that they be certificated by the Department of Commerce, and has differentiated between seamen and other workmen with respect to the payment of time and one-half for overtime work.

The Respondent in the case at Bar did not consider himself a seaman. When asked what his occupation was, he replied that he was a longshoreman (R. p. 12). He was perfectly correct in so stating. Bouvier's Law Dictionary, Eighth Edition defines a seaman as "a sailor, a mariner, one whose business is navigation—Article 7, Laws of Oleron; Article 19, Laws of Wisby. The term seaman in its most enlarged sense includes the captain as well as the other persons of the crew; in a more confined significance it extends only to the common sailors". The foregoing definition is as accurate today as it was centuries ago in the days of Oleron and Wisby. Ballantine's Law Dictionary (1930) defines a seaman as "a person whose occupation is to assist in the management of vessels at sea." Webster's New International Dictionary, Second Edition, defines a seaman as "one whose occupation is to assist in the management of ships at sea, a mariner, a sailor."

A longshoreman is defined by Webster, supra, as "a laborer, as a stevedore or loader, who works about the wharves of a seaport". Webster defines "stevedore" (derived from the Spanish "estivador" meaning a packer or a stower) as "One who works at, or one who is responsible for, the unloading or loading of a vessel in port."

The Maritime Law, it will thus be seen, clearly recognized the distinction between a seaman and a stevedore prior to the decision in *International Stevedoring Co. v. Haverty*. That decision has been criticized as unrealistic, 38 *Yale Law Journal, supra* 472; 27 *Columbia Law Review*, 211; *Robinson on Admiralty, supra*. As is said by Stanley Morrison, in *"Workmen's Compensation and the Maritime Law", supra,*

> "The Supreme Court has lost sight of realities with regard to longshoremen and harbor workers."

See also 16 *Boston University Law Review* 308.

The cases cited in the opinion of the Circuit Court of Appeals did not consider the question here involved.

In *W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel*, 41 F. (2d) 651, the action was in Admiralty as modified by the Jones Act, and the Court relied upon *International Stevedoring Co. v. Haverty, supra.* The Court in the *Stoffel* case was thus discussing the effect of a release executed by a person who was to be considered a seaman under the terms of the Jones Act under which he was proceeding. Whatever may be the interpretation of the word seaman as used by Congress in the Jones Act, it can have no application to the case at Bar where the Respondent is not proceeding under the Jones Act. That Act is not applicable because he has not sued his employer.

Cassil v. United States Emergency Fleet Corporation, 289 Fed. 774, also relied upon by the Circuit Court, was a Libel in Admiralty. That the statement of the Court in that case concerning unseaworthiness is purely obiter is clearly shown by the later statement in the same opinion, that there was no allegation that the accident resulted from the use of any defective appliance of the ship. If the *Cassil* case is strong authority for any proposition, it is that stevedores are not seamen under the general Admiralty Law, whatever may be their status under the Jones Act.

There is an analogy between the problem here involved and the distinctions which have been recognized between stevedores and members of the crew in the application of the Longshoremen's and Harbor Workers' Compensation Act.

It has been attempted heretofore to point out that the use of the word seaman in the general Maritime Law has applied to those persons who were members of the crew and not to longshoremen or stevedores. In interpreting the Longshoremen's and Harbor Workers' Compensation Act, supra, this Court has now defined the two classes for the

purposes of that Act. In *South Chicago Coal & Dock Co. et al v. Bassett*, 309 U. S. 251, 60 S. Ct. 544, this Court held that a person on board a vessel was not a member of the crew where his duties were such that he was not naturally and primarily on board to aid in the navigation of the vessel. In *Norton v. Warner Co.*, 321 U. S. 565, 64 S. Ct. 747, the test which was applied in determining that Rusin was a seaman was the nature of his duties.

In the *Bassett* case, this Court said,

> "They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employes on the vessel who are naturally and primarily on board to aid in her navigation."

The distinction there drawn is, we submit, equally valid here. As was said by Mr. Justice Cardozo when he was Chief Justice of the New York Court of Appeals, in *Yaconi v. Brady & Gioe, Inc., et al*, 246 N. Y. 300; 158 N. E. 876, when the same argument was made as was here accepted by the Circuit Court of Appeals,

> "A stevedore however styled under the Jones Act is not a seaman under the rule of general maritime law with its special exemption to those subject to the power of a master. . . . Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which applied to seamen and no others."

That language by Mr. Justice Cardozo, who cited the *Haverty* case in his opinion, was before this Court upon petition for writ of certiorari. The Court which there denied the petition, 276 U. S. 636; 48 S. Ct. 421, was exactly the same Court which one year before had decided the *Haverty* case. The decision in the instant case accepts the theory which Mr. Justice Cardozo rejected.

It is submitted that a longshoreman or stevedore is not subject to the distinctive features of the Maritime Law

which apply to members of the crew for the reasons which have been outlined earlier in this Brief.

The duty which the decision of the Circuit Court would fasten upon a shipowner is one which it would be practically impossible for him to meet. There are a number of cases which recognize that the duty to furnish a seaworthy vessel relates to the time of sailing or "breaking ground". *Globe S. S. Co. v. Moss*, 245 Fed. 54; *The Josephine*, 49 F. (2d) 207; *The Fort Gaines*, 21 F. (2d) 865; *Cullen Fuel Co., Inc., v. W. E. Hedger, Inc.*, 290 U. S. 82; 54 S. Ct. 10; *Warranty of Seaworthiness* 48 Solicitor's Law Journal 81. Any other interpretation would obviously make it impossible of compliance by the shipowner. Nothing as large as a ship and her machinery could possibly be absolutely perfect at all times; maintenance and repair are obviously necessary and, of necessity, are largely performed in port.

Seaworthy means "Fit for a sea voyage; able to stand stormy weather in safety", Webster's New International Dictionary (Second Edition). To apply the doctrine blindly and without regard to its true meaning, to a class of persons to whom historic reasons do not apply, is to fasten liability without reason. The Respondent here is not without a remedy. Congress has granted him one against his employer under the applicable Compensation Act. Furthermore, in this case, the Respondent has in fact a final judgment for the full amount of his claim against responsible shipbuilders, the Bethlehem Companies.

Conclusion.

It is respectfully submitted that the Circuit Court of Appeals has misconstrued the applicable Maritime Law because it failed to take into account the reasons which gave rise to the warranty of seaworthiness, which reasons have no application in the case of a longshoreman or stevedore. When the holding of this Court in the *Haverty* case is examined in the light of all of the surrounding circumstances, it becomes clear that it was never intended that the

definition of "seamen" attributed to Congress in passing the Jones Act should extend to all instances where the word has been used in the general Maritime Law. In the case at Bar the Jones Act is not involved, and there is no question of interpreting the intent of Congress in the use of a word in a statute. The meaning of the word "seamen" is to be gleaned from the general Maritime law, from its use by Judges in deciding cases where there was never any question that by using the word "seamen" an intent to include a stevedore might be inferred. It is respectfully submitted that in interpreting this word as used in the general Maritime Law, this Court should reach the conclusion that a stevedore is not a seaman, and that the decision of the Circuit Court of Appeals should be reversed.

The decision of the Circuit Court will, if affirmed, place longshoremen and stevedores in a more favored position than actual seamen who, as wards of the Admiralty, have always been a specially favored class.

Respectfully submitted,

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